

1 February 2006

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Dear Ms Sibisi

Comments on Clause 1 of the Constitution Fourteenth Amendment Bill

1. Introduction

1.1. We refer to the email from the Secretary of the Portfolio Committee on Justice, Mr B Kali, dated 27 January 2006. We have taken note of Mr Kali's kind invitation to submit comments on the Constitution Fourteenth Amendment Bill, 2005 ("the Bill") to the Portfolio Committee on Justice.

1.2. The Legal Resources Centre is involved in constitutional litigation of a public interest character. It strives through litigation to protect and uphold the rights of persons too poor or otherwise disadvantaged to approach the courts through their own means. The Legal Resources Centre has been involved in such work since 1979. The Centre also seeks to promote the rule of law in our constitutional democracy by conducting public interest litigation in the constitutional field. In so doing, we seek to support and build universal respect for

the courts, the rule of law, and the administration of justice in South Africa.

1.3. We have already submitted comments on clause 7(b) of the Bill to the Minister of Justice in response to the Government Gazette notice published by her inviting comment. We were informed by the Department of Justice that these comments were forwarded to the Speaker of the National Assembly. We note from Mr Kali's email that the Speaker has not as yet forwarded to the Portfolio Committee the comment which we submitted to the Minister of Justice on Clause 7(b) of the Bill. We accordingly attach a copy of that comment to this letter and respectfully ask that it be drawn to the attention of Committee members. We believe it will be of assistance to the Committee as we have carefully considered the law as it now stands regarding that issue, in the process of examining whether there is any justification for amendment.

1.4. There was one further aspect of the Bill which we did not have time to comment on in the submission to the Minister of Justice, given that we only became aware of the invitation to comment shortly before the deadline. This aspect is clause 1 of the Bill. In this comment, we show that clause 1 of the Bill is in conflict with the fundamental premises of the Constitution, in conflict with a way forward that was explored at a judicial colloquium convened by the Government and in conflict with Constitutional Court and foreign authority.

2. **Clause 1 in conflict with constitutional principles and other provisions of the Constitution**

2.1. Constitutional Principle VI provides as follows:

"There shall be a separation of powers between the legislature, executive and judiciary, with appropriate

checks and balances to ensure accountability, responsiveness and openness.”¹

2.2. The Constitutional Principles remain an important consideration in these circumstances. Not only does this arise from the reception of travaux préparatoires in *S v Makwanyane*,² but it was also pointed out by Goldstone J during argument in the Certification case that –

“a future Constitutional Court, sitting in ten to three hundred years’ time, would have to refer to the [Constitutional Principles]. They do not disappear. They would be a primary source of interpretation.”³

2.3. Section 173 of the Constitution provides that the High Courts, the Supreme Court of Appeal and the Constitutional Court -

‘have the inherent power to protect and regulate their own process’.

2.4. The Constitution was built by the Constitutional Assembly around the fundamental premise of the applicability of the doctrine of separation of powers. In so far as it pertains to the courts, the doctrine of separation of powers is expressly encapsulated in section 165 of the Constitution. In its current, un-amended form, section 165 holds that:

‘(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law ...;

¹ Schedule 4 to the Interim Constitution.

² 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665)

³ Andres and Ellmann *Post Apartheid Constitutions: Perspectives on South Africa’s Basic Law*

(3) *No person or organ of state may interfere with the functioning of the courts.*

(4) *Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence impartiality, dignity, accessibility and effectiveness of the courts.*

(5) *...*

2.5. The term “functioning”, which was chosen by the Constitutional Assembly and appears in section 165(3), is a deliberately broad one. A reference to dictionary definitions of related words, including “function” and “functionary”, shows that the word “functioning” embraces notions of public administration and officialdom. In the context of section 165(3), the intention of the Constitutional Assembly was clearly to incorporate both the official or administrative functions and the judicial functions of the courts as having a status deserving of protection and independence. It is also significant that section 165(3) follows immediately upon the fundamental assertion of the independence of the courts (not just the judiciary) in section 165(2).

2.6. Reading sections 165(2), (3) and (4) together and in context, as a proper approach to constitutional interpretation requires, it is clear that the Constitutional Assembly envisaged that not only the adjudicative function of the judiciary, but also the day to day operation of the courts, their officials and their administrative activity, would fall within the separate and independent judicial arm of government.

2.7. In recognising this, the Constitutional Assembly had clearly and correctly taken into account the practical reality that the administration of the courts is inextricably bound up with the performance of the adjudicative function. Absent the

administrative element of the courts, there is, practically speaking, no court system. Moreover, administrative officials are extensively involved in the performance of important components of the adjudicative function. For example –

- 2.7.1. Registrars have powers to grant default judgments and to tax bills of costs.
- 2.7.2. The court officials perform functions relevant to ensuring the efficacious despatch of judicial business in open court.
- 2.7.3. The maintenance by the library staff of a well resourced library directly affects the ability of the judiciary to perform its function in a manner which upholds the required standards of an independent and respected judiciary.
- 2.7.4. The court officials oversee payments into court as a component of the adjudication of disputes.
- 2.7.5. The court officials represent the public face of the administration of justice outside of the court room.
- 2.7.6. Correspondence by the public with the court in relation to the adjudicative function takes place through the Registrar.
- 2.7.7. Most importantly, the Registrar and officials of the court have important functions in relation to the issuing of process of the court and execution of the orders of the Court. These processes are administrative in nature, but they lie at the heart of the judicial process. Yet on the basis of the amendment, these processes and the staff who implement them will be subject to the control of the executive.

- 2.8. The assumption by the executive of responsibility for the management of the administrative component of the courts and their officials would therefore represent a direct incursion into activities that are currently recognised in the Constitution as falling within the separate judicial sphere of government.
- 2.9. Yet this is precisely what clause 1 of the Bill will bring about. It seeks to limit the Chief Justice to the “*establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law.*” There are numerous difficulties with this clause:
- 2.9.1. it appears to be based on a false distinction between the judiciary and the courts;
- 2.9.2. it is most difficult to understand what “judicial functions” are envisaged if these exclude both administration of the courts on the one hand and adjudication of matters on the other;
- 2.9.3. it is also most difficult to understand what types of norms and standards are referred to;
- 2.9.4. the confinement of the judiciary and, indeed, only one of its members, to the “establishment and monitoring of norms and standards” for the unspecified, non-adjudicative, judicial functions, is in direct conflict with section 165(3) which envisages the judiciary being independently responsible for all components of the broad “functioning” of the courts; and
- 2.9.5. the division of judicial powers and functions in this way leaves the executive responsible for the day to day functioning of the courts, which, as pointed out above, represents an indispensable and integral part of the

judicial or adjudicative function. For the executive to assume responsibility for it represents a serious breach of the separation of powers doctrine. It is contrary to the fundamental premises upon which our Constitution is based and would therefore be unconstitutional and invalid.

- 2.10. Related to the constitutional imperative for the judiciary to retain control over the administration of the courts if the fundamental constitutional premise of a separation of powers is to be honoured, is the need for the judiciary to control the budgeting process. The courts cannot be expected properly to maintain the efficacious and independent administration of justice without the appropriate degree of control over budgeting. This is elaborated upon below.
- 2.11. Numerous models exist for appropriate involvement of the executive in the budgeting process carried out by the judiciary, without a complete appropriation of that function by the executive, as the Bill wrongly attempts to do.
- 2.12. Of importance to the Portfolio Committee is the reference in the current section 165(4) to *“legislative measures”*, which will provide a vehicle for organs of State to *“assist and protect the courts to ensure the independence impartiality, dignity, accessibility and effectiveness of the courts”*. Given that Parliament is responsible for legislation, this imposes a special duty on Parliament and its committees to scrutinise legislation such as the Bill before Parliament for compliance with the standard set by section 165(4) of the Constitution.
- 2.13. Such scrutiny reveals that Clause 1 of the Bill will undermine rather than assist the courts in the endeavour which section 165(4) envisages. Therefore whilst purporting merely to

supplement section 165, Clause 1 of the Bill is in direct conflict with it.

- 2.14. Given the important role conferred on the Portfolio Committee by section 165(4), we would respectfully submit that the Bill would be an appropriate matter on which to receive oral submissions by interested parties and a far more structured process for receiving comment.

3. **Clause 1 in conflict with way forward explored at colloquium**

- 3.1. Acting pursuant to its duties in terms of section 165(4) of the Constitution, in October 2000 the South African Government convened a Justice Colloquium to 'chart the way forward for the administration of justice' as the then Minister of Justice put it.

- 3.2. The Colloquium was structured around three working groups dealing with different aspects of the justice system. A resulting report issued by the second working group, chaired by a senior judge, was entitled 'Court Management and Effective and Efficient Resources Utilisation'.

- 3.3. That report recommended that 'at least 2% of Consolidated Revenue Fund of the Republic of South Africa be allocated to the Judiciary and the said budget be run and controlled by the Chief Justice and the single commander in charge of the whole judiciary' (emphasis added).

- 3.4. Those recommendations were expressly based on the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independency. These guidelines are promoted by the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association.

3.5. The explanatory memorandum accompanying the Bill is therefore quite wrong insofar as it suggests in the explanation of Clause 1 of the Bill that the Bill will maintain and constitutionally entrench the Commonwealth model of the separation of powers.

3.6. The proposed amendment conflicts with the recommendations of the colloquium and the Commonwealth guidelines.

4. **Clause 1 in conflict with authority**

4.1. When identifying the conditions for judicial independence, the Constitutional Court, in *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at paras 70 - 72, applied a leading Canadian Case, *R v Valente* (1985) 24 DLR (4th) 161 (SCC). In that case, three conditions for independence were identified:

(1) Security of Tenure;⁴

(2) Financial Security;⁵ and

(3) “the institutional independence of the [judicial body] with respect to matters of administration bearing directly on the exercise of its judicial function.”⁶

4.2. Clause 1 breaches the third condition by removing control over the general and financial aspects of administration of the courts. In support of this submission, it is helpful to quote directly from the judgment of Le Dain J in *R v Valente*:

With regard to general administration:

⁴ At para 27.

⁵ This is a reference to ‘security of salary or other remuneration’ only: At para 40.

⁶ At para 47 and quoted at para 70 of *De Lange v Smuts NO and Others*.

“Judicial control over ... assignment of judges, sittings of the court, and court lists--as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or "collective" independence.”⁷ (emphasis added)

With regard to budgetary concerns:

“I regard as desirable supports for judicial independence, ... independence in budgeting and in expenditure of an approved budget, and independence in administration, covering not only the operation of the Courts but also the appointment and supervision of the supporting staff. Budget independence does not mean that Judges should be allowed to fix their own salaries; it means simply that the budget should not be part of any departmental budget but should be separately presented and dealt with. I do not, of course, preclude its presentation by a responsible Minister, but he should do this as a conduit, and yet as one able to support the budget after its preparation under the direction of the Chief Justice or Chief Judge and the chief administrative officer of the Court. So, too, should the Court, through its Chief Justice or Chief Judge and chief administrative officer, have supervision and direction of the staff of the Court and of the various supporting services such as the library and the Court's law reports.”⁸ (emphasis added)

4.3. In *Valente*, the important point was also made that –

⁷ At para 49.

⁸ At para 50.

“independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice”

4.4. Public confidence will be undermined by the implementation of clause 1. In this regard it must be remembered that the Minister of Justice and Constitutional Development in her official capacity is often a party to court cases, particularly Constitutional Court cases. Litigants will have reasonable and serious concerns about the fact that the court in which they are litigating is entirely subject to the administrative and budgetary control of one of the parties to the dispute.

4.5. The term “administration of justice”, which is the preserve of the independent judiciary, is no coincidence and it is something which, once past the doors of the court, is the responsibility of the courts and not the executive.

4.6. Thus Clause 1 conflicts not only with the fundamental premises and specific provisions of the Constitution, but also with Canadian authority which has received strong endorsement by the Constitutional Court of South Africa. The fact that Clause 1 conflicts with this authority places serious doubt over the constitutionality of the provision.

5. **Clause 1 in conflict with international law and foreign law**

5.1. Section 39 of the Constitution makes international law and foreign law a relevant criterion in considering Clause 1.

5.2. In the Memorandum on the Objects of the Constitution Fourteenth Amendment Bill, 2005, the objects of Clause 1 are said to include maintaining and constitutionally entrenching ‘the Commonwealth model of the separation of powers between the Executive and Judiciary’.

- 5.3. This is not the effect of the Bill. The Bill's conflict with the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independency has already been referred to above.
- 5.4. Those guidelines further note that '[t]he allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.' With all due respect to the Minister, passing authority over the budgets of all courts to the Minister of Justice opens the possibility of such improper control. In this regard, while the *bona fides* of the present Minister is accepted, it must be remembered that a Constitution regulates affairs indefinitely into the future.
- 5.5. In the United States of America, to preserve the principle of separation of powers, Congress permits the judiciary to set and implement its own budget. The Administrative Office consults with the Judicial Conference to draft a budget, which is reviewed by the Conference and then submitted to Congress which holds hearings to determine the justification behind the proposed expenditures. Once approved, the Administrative Office disperses the allotments to each court which can utilise them at will so long as their use is consistent with Conference policy.⁹
- 5.6. Individual states in America have their own mechanisms for financing their courts. In New York, for example, the state assumes the cost for all but the town and village courts. New York state courts operate within a Unified Court System whose organisation, administration and financing are prescribed by the State Constitution and the Unified Court Budget Act.¹⁰

⁹ www.uscourts.gov/understand02/ (accessed 15/05/05)

¹⁰ <http://www.budget.state.ny.us/citizen/structure/structure.html>

- 5.7. The conflict with Canadian authority is already apparent with what is set out above in the discussion of the *Valente* case. The Canadian federal court system employs a Court Administrator, appointed by the Governor in Council, who oversees the management and administration of the courts, including budget preparation.¹¹ One goal of the Courts Administration Service Act is to “enhance judicial independence by placing administrative services at arm's length from the Government of Canada.”¹²
- 5.8. In Australia, the High Court and the Federal Court are administered by the Justices collectively (in the case of the High Court) or by the Chief Justice (in each federal court created by Parliament).¹³ Each court must maintain proper financial accounts and provide estimates of receipts and expenditure to the Attorney-General so as to assist in the calculation of the future funding for the court.¹⁴
- 5.9. At a State level, similar provisions apply in respect of the Supreme Court of Queensland.¹⁵ In South Australia, under the *Courts Administration Act 1993* (SA), the responsibility for the provision of administrative facilities and services to the courts is conferred on a body known as the State Courts Administration Council.¹⁶ The Council is composed entirely of members of the judiciary, and is independent of control by the executive government.¹⁷

¹¹ Courts Administration Service Act 2002, c. 8 (3)

¹² *Id.* (2)(b)

¹³ *High Court of Australia Act 1979* (Cth), s 17; *Federal Court of Australia Act 1976* (Cth), s 18A; *Family Law Act 1975* (Cth), s 38A.

¹⁴ *High Court of Australia Act 1979* (Cth), ss 35-37, 42; *Federal Court of Australia Act 1976* (Cth), ss 18T, 18V; *Family Law Act 1975* (Cth), s 38T.

¹⁵ *Supreme Court of Queensland Act 1991* (Qld), ss 13A, 32-33, 60-61.

¹⁶ *Courts Administration Act 1993* (SA), s 10.

¹⁷ *Courts Administration Act 1993* (SA), s 7.

- 5.10. The proposed amendment is in conflict with the systems of other common law countries. In each of the examples above, authority for the administration of the courts is at the very least given to a body that is independent from the executive and legislature, if not under the direct control of the courts. The judiciary also plays a significant role in the court's budget process in each of the foreign systems above, with the legislature merely approving the judiciary's proposals in the US.
- 5.11. The proposed amendments in Clause 1 make incursions into the independence of the judiciary that go well beyond what is acceptable in other countries whose legal systems are recognised in various ways as having an important influence on our own.

6. **Conclusion**

- 6.1. Based on what we have set out above, we submit that it is most undesirable that these amendments be made to the Constitution.
- 6.2. It seems to us, with respect, that there is no compelling reason of principle or practicality which justifies them.
- 6.3. We respectfully submit that Clause 1 should be omitted from the draft Bill. To drop these amendments and leave the text as it stands would honour the original work of the Constitutional Assembly in crafting a blue-print for the nation which has served its citizens well and which has earned respect all over the world.
- 6.4. We thank you for considering these comments. We offer to provide clarification in respect of any points requiring elucidation or supplementation. We respectfully request that

we be allowed the opportunity of an oral presentation in any *fora* in which such a presentation might be permitted.

Yours faithfully

Legal Resources Centre

Per: Alan Dodson

Constitutional Litigation Unit

(letter sent by electronic mail)